

IN THE MATTER OF	*	BEFORE THE
PIKESVILLE HOSPITALITY INVESTORS, LLC –	*	BOARD OF APPEALS
LEGAL OWNER	*	
TWO FARMS, INC./CANTON CARWASH –	*	OF
DEVELOPER/LESSEE	*	
DRC NO: LIM-2021-00001-C	*	BALTIMORE COUNTY
3 RD ELECTION DISTRICT	*	
2 ND COUNCILMANIC DISTRICT	*	CASE NO: CBA-21-017

* * * * *

OPINION

This matter comes before the Board of Appeals (the "Board") as two separate appeals of a Limited Exemption Development Plan (the "LEDP") approved by Baltimore County on January 25, 2021 (the "LEDP Approval"). The first appeal was filed by the Office of People's Counsel on February 16, 2021 (the "First Appeal"). The second appeal was filed on behalf of the Pikesville Communities Corporation and Afshin Attar, who owns a fuel service station located at 1803 Reisterstown Road, on February 17, 2021 (the "Second Appeal").

Petitioner, Pikesville Hospitality Investors, LLC, represented by Adam M. Rosenblatt, Esquire and David H. Karceski, Esquire of Venable LLP, filed a Motion for Partial Dismissal. Petitioner argued that the only issue permitted to be litigated in the *de novo* appeal is the approval of the LEDP. They assert that any issues litigated by Protestants relating to the approval by the Development Review Committee (the "DRC") and the approval by the Director of Planning of an "Approved Planned Drive-In Cluster", should be prohibited and barred because they were not timely appealed. Oppositions to Petitioner's motion were filed by the Protestants, Afshin Attar and Pikesville Communities Corporation, represented by G. Macy Nelson, Esquire of the Law Office of G. Macy Nelson, LLC, and the Office of People's Counsel, represented by Peter Max Zimmerman, Esquire, People's Counsel for Baltimore County. A Renewed Motion was subsequently filed by Petitioners.

Preliminary matters were heard during a virtual, Webex, hearing before this Board on January 25, 2022. The Board held a public deliberation on February 15, 2022.

On April 13, 2022, this Board issued an Order of Stay and Remand to the Administrative Law Judge (“ALJ”) for further proceedings by the ALJ and Director of Permits, Approvals and Inspections regarding whether the proposed development meets the criteria for a Planned Drive-In Cluster, Type W. The ALJ issued a letter regarding the remand order, wherein he determined that it is not authorized or appropriate for the ALJ to offer an “advisory opinion” and determining that the “[Department of Planning]’s approval or denial is then a final decision which must be appealed directly to the Board of Appeals for *de novo* review.”

On or about May 4, 2022, the Office of People’s Counsel withdrew their appeal, leaving us with the Second Appeal (the “Appeal”).

This Board convened for a public deliberation on June 15, 2022 at which it determined that the Motion for Partial Dismissal shall be granted and a hearing on the merits of the LEDP shall be scheduled.

STATEMENT OF FACTS

On June 4, 2018, the Baltimore County Council passed Bill 53-18, which: (1) amended the definition of a "Drive-In Cluster, Planned" contained in § 101.1 of the Baltimore County Zoning Regulations ("BCZR"); and (2) amended § 405.4 of the BCZR to provide that a full service car wash is permitted by right in combination with a fuel service station if the project is located in a Planned Drive-In Cluster. *See* Bill 53-18, attached to the First Appeal. Following the enactment of Bill 53-18, the definition of a Planned Drive-In Cluster was amended to read as follows:

An integral commercial development for which an overall plan has been approved by the Department of Planning and which meets the following criteria for Type 1 or Type 2:

- A. Type 1: Is under common ownership or control; is on a site at least three acres in net area; has at least 500 feet of lot frontage on arterial streets; and is devoted primarily to drive-in uses or other vehicle-oriented establishments, with vehicular access to any use in the development solely from service drives on the site.
- B. Type 2: Is under common ownership or control; is on a site at least 2.5 acres in net area; has at least 250 feet of frontage on an arterial street; has vehicular access to an arterial street within 300 feet of the right-of-way of an interstate highway; and is devoted primarily to drive-in uses or other vehicle-oriented establishments, with vehicular access to any use in the development from service drives on the site.

BCZR § 101.1.

Petitioner, Pikesville Hospitality Investors, LLC, applied for approval for the redevelopment of the property known as 1721 Reisterstown Road with a fuel service station, full-service car wash, and a convenience store/carryout restaurant.

On September 18, 2018, the Director of the Department of Permits, Approvals and Inspections (PAI) issued a written letter accepting the recommendation of the DRC to approve a Limited Exemption under § 32-4-106(b)(8) of the Baltimore County Code (BCC) for this project (the "DRC Approval"). No appeal was taken to the DRC Approval.

In November 2018, the Director of Planning issued an approval letter and signed a Planned Drive-In Cluster Plan confirming that the project is "Approved as a Planned Drive-In Cluster, Type 2, pursuant to BCZR Section 101.1" (the "Planned Drive-In Cluster Approval"). No appeal was taken to the Planned Drive-In Cluster Approval.

In the fall of 2020, the project was presented to the Baltimore County Design Review Panel (DRP), which issued a recommendation approving the design of the project on October 28, 2020. On November 13, 2020, pursuant to BCC § 32-4-203(1), the Director of PAI, as designee for PAI, the Department of Planning (DOP), and the Department of Environmental Protection and Sustainability (DEPS), formally accepted the DRP's recommendation and approved the design of this project (the "DRP Approval"). No appeal was taken to the DRP Approval.

On January 25, 2021, the LEDP Approval was issued, formally determining that the LEDP had been approved. The First Appeal was filed on February 16, 2021, and the Second Appeal was filed on February 17, 2021.¹

LAW

The Express Powers Act, MD Code Ann., L.G., §10-305(b) (formerly Article 25A) controls the Board's jurisdiction to hear cases as follows:

(b) Jurisdiction. – The county board of appeals may have original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county government over matters arising under any law, ordinance or regulation of the county council that concerns:

- (1) an application for a zoning variation or exception or amendment of a zoning map;
- (2) the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order; or
- (3) the assessment of any special benefit tax.

Consistent with the Express Powers Act, the County Charter, §602, sets forth the functions and powers of the Board as follows:

The county board of appeals shall have and may exercise the following functions and powers:

(a) *Appeals from orders relating to zoning.* The county board of appeals shall have and exercise all the functions and duties relating to zoning described in Title 10 of the Local Government Article of the Annotated Code of Maryland as such functions and powers may be prescribed by legislative act of the county council. All references in law to the board of zoning appeals shall be construed to refer to the county board of appeals. In all cases, except those excluded by this Charter or by legislative act of the county council, the order of the county board of appeals

¹ As previously stated, the Office of People's Counsel dismissed their appeal on or about May 4, 2022.

shall be final unless an appeal is taken therefrom in the manner provided in Section 604 of this Article.

(b) *Appeals from orders relating to licenses.* The county board of appeals shall have and exercise all the functions and powers of the board of license appeals as such functions and powers are prescribed in the public local laws of the county in effect at the time of the adoption of this Charter. All references in said laws to the board of license appeals shall be construed to refer to the county board of appeals created by this article. As soon as the county board of appeals has been duly constituted by the appointment and qualifications of its members as herein provided, the board of license appeals shall cease to exist.

(c) *Appeals from orders relating to building.* The county board of appeals shall hear and decide all appeals from orders relating to building.

(d) *Appeals from executive, administrative and adjudicatory orders.* The county board of appeals shall hear and decide appeals from all other administrative and adjudicatory orders as may from time to time be provided by Title 10 of the Local Government Article of the Annotated Code of Maryland, as amended, or by legislative act of the county council not inconsistent therewith.

(e) The county board of appeals shall have original and exclusive jurisdiction over all petitions for reclassification.

In order to streamline and facilitate the development process, the Director of PAI, under the authority granted in the BCC, created the DRC. The DRC is an informal group consisting of representatives of PAI, the Department of Public Works, the Department of Recreation and Parks, the Department of Environmental Protection and Sustainability, and the Department of Planning. The DRC is chaired by a representative of PAI. The DRC reviews proposed plans and formulates recommendations to the Director of PAI on requests for limited exemptions under BCC § 32-4-106(a) and (b). The DRC's recommendations are reviewed and either adopted, or not, by the Director of PAI. Decisions of the Director of PAI are final decisions, which are directly appealable to this Board under the holding in *UPS v. People's Counsel*, 336 Md. 569 (1994).

Appeals to this Board are governed by Rule 3 of the Rules of Practice and Procedure of the Baltimore County Board of Appeals. Rule 3.C states as follows:

All appeals to the Board of Appeals shall be made within thirty (30) days from the date of the final action appealed, unless otherwise provided by County Code.

Additionally, BCC § 32-3-401 states that a person feeling aggrieved by a decision of the Director of PAI may appeal the decision or order to this Board. Notice of the appeal shall be filed, in writing, “within 30 days after the final decision.” See BCC § 32-3-401(c). This section has been held to authorize the appeal of a limited exemption approval if filed within thirty (30) days of the issuance of the decision. *Beth Tfiloh Congregation of Balt. City, Inc. v. Glyndon Cmty. Ass’n*, 152 Md. App. 97, 108 (2003).

DECISION

An Appeal must be filed within thirty (30) days as required by the plain language of Rule 3 of the Rules of Practice and Procedure of this Board, and BCC § 32-3-401. These sections provide that an appeal “shall” be filed within thirty (30) days, and the word shall “shall have a mandatory effect and establish a requirement.” BCC § 1-2-209. It is well settled that where a notice of appeal is not timely filed, the appellate tribunal has no authority to decide the case. *United Parcel v. People's Counsel*, *supra*, 336 Md. at 580; *Dabrowski v. Dondalski*, 320 Md. 392, 397-398 (1990); *Walbert v. Walbert*, 310 Md. 657, 662 (1987).

The Appeals in this case were filed on February 16th and 17th, 2021, within thirty (30) days of the approval of the LEDP. The two appeals were the first and only appeals filed in this case. No appeals were filed after the DRC Limited Exemption approval on September 18, 2018, the Planned Drive-In Cluster, Type 2 approval on October 30, 2018, or the approval of the DRP on November 13, 2020. As such, the administrative decisions made therein are final and the Board does not have the authority to reverse or modify said decisions.

The appeal of the LEDP was timely filed, thus the Board shall set this matter in for a *de novo* hearing solely on the issue of the approval of the LEDP.

The Petitioner's Petition for Partial Dismissal is **GRANTED**.

ORDER

THEREFORE, it is this 17th day of November, 2022, by the Board of Appeals for Baltimore County,

ORDERED, that the Petitioner's Motion for Partial Dismissal is hereby **GRANTED** for the reasons set forth herein; and it is further

ORDERED, that a final Opinion will be issued by this Board after a hearing on the merits and a public deliberation, with no further action to be taken on this Ruling until such time as the Board's final decision is issued.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**

Adam T. Sampson

Adam T. Sampson, Panel Chair

Fred M. Lauer

Fred M. Lauer

Bryan T. Pennington

Bryan T. Pennington



Board of Appeals of Baltimore County

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November 17, 2022

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RE: In the Matter of: Pikesville Hospitality Investors, LLC – Legal Owner
Two Farms, Inc. / Canton Carwash – Developer/Lessee
Case No.: CBA-21-017

Dear Counsel:

Enclosed please find a copy of the Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Pursuant to the enclosed, this Order is not a final decision of the Board of Appeals for Baltimore County and does not constitute an appealable event at this time. This matter will be held open on the Board's docket until such time as a final opinion can be issued.

Should you have any questions, please do not hesitate to contact us.

Very truly yours,

A handwritten signature in cursive script, reading "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letter

c: See Distribution List following

In the matter of: Pikesville Hospitality Investors, LLC – Legal Owner
Two Farms, Inc. / Canton Carwash – Developer/Lessee

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Case No.: CBA-21-017

Distribution List

November 17, 2022

Pikesville Hospitality Investors, LLC

John M. Kemp, President/Two Farms, Inc./Canton Carwash

Afshin Attar

Alan P. Zukerberg, President/Pikesville Communities Corporation

Alan P. Zukerberg, Esquire

Ryan Coleman, President/Randallstown NAACP

Tanya L. Bensinger, P.E./Matis Warfield

Office of People's Counsel

Paul M. Mayhew, Managing Administrative Law Judge

Stephen Lafferty, Director/Department of Planning

Lloyd Moxley, Development Manager/PAI

C. Pete Gutwald, Director/PAI

James R. Benjamin, Jr., County Attorney/Office of Law